Supreme Court of the United States

October Term, 1956

No. 842

ALLIED STEVEDORING CORPORATION, JOHN WARD, JOHN POTTER and MICHAEL BOWERS,

Petitioners,

vs.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

Introduction

The Government in its Brief in Opposition (hereafter "Brief") refers in detail to evidence introduced at the trial (Brief, pp. 5-7). This evidence is not pertinent to the points raised in the Petition and its only motivation would seem to be an attempt to prejudice this Court against the petitioners. Many of the statements of evidence are inaccurate and misleading. However, since they are not relevant, no attempt will be made to correct them.

This Reply Brief will be addressed solely to the legal arguments pertinent to the points raised in the Petition. In addition, we will attempt to correct factual errors relevant to these points found in the Government's Brief.

Argument

As to Question 1:

As pointed out at page 9 of the Petition, a motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure, Title 18 U. S. C., was made to the district court on July 9, 1956, to vacate and correct the sentences imposed on the petitioners because in excess of the maximum sentence permissible under Section 3616(a) of the Internal Revenue Code of 1939, Title 26 U. S. C. That motion was denied by the district court in an extensive opinion dated July 20, 1956. That opinion, which was filed as an order on July 23, 1956, was part of the record below and is incorporated in the record before this Court.

The claimed illegality of the sentences and the alleged error in the district court's decision on the aforementioned motion were pointed out and appealed from by petitioners at pages 21-22 of their brief in the Court of Appeals below. In the Court below petitioners appealed from the judgments of conviction which imposed sentences in excess of one year and/or $1,000 as provided by Section 3616(a). In the opinion of the Court below, and the judgment entered thereon on February 4, 1957, these judgments of conviction were affirmed.

In the application for rehearing made on February 18, 1957, to the Court below, petitioners asked that the Court's decision on said petition be deferred pending decision by this Court on this misdemeanor-felony issue as raised in the case of *United States* v. *Costello,* 221 F. 2d 668 (2d Cir. 1955), pending on certiorari, this Term, No. 666. The Court below denied the application for rehearing on February 25, 1957, and refused to defer its decision.

Accordingly, the statement by the Government in its Brief that the misdemeanor-felony issue "was not passed upon by the court below" is most disingenuous. The Government relies on language by the Court below expressing doubt as to its decision. However, the Court did not refuse to rule on the point, nor did it defer such ruling.

It is submitted that both the district court and the Court of Appeals below adjudicated the legality of the petitioners' sentences and the issue is now properly before this Court.*

As to Question 2:

The district court's charge relating to aiding and abetting did not relate to the issue as to whether the petitioners Potter and Bowers filed or caused to be filed a false return as charged in the indictment. The district court evidently agreed with petitioners' contention at the trial that there was no evidence that these two had knowledge of the filing of the false return. However, the district court denied their motion to dismiss on the ground that the language in the indictment pertaining to "filing and causing to be filed a false and fraudulent tax return" was surplusage (R. 1317-32).** Consistent with this holding that the filing of the return portion of the indictment

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* The petitioners Ward and Bowers were released on bail pending certiorari on April 26, 1957 by order of the trial court and the Hon. L. Hand. Thus the district court and Court of Appeals view this issue as being out of their hands. Denial of this question in the Petition as premature would place the petitioners in an impossible position as far as the bail issue is concerned.

** Record references are in accordance with the Government's practice (Brief, p. 4, fn. 1).

was surplusage, the trial court charged the jury that they need only find evasion "in any manner," in terms of the statute, Section 145(b) of Title 26 U. S. C. (R. 1366-67; 1369; 1370; 1371-72; 1373-74). The court's holding was that the Government could charge in an indictment that a defendant evaded taxes "in any manner" without specifying the manner; and if it did so specify by charging the means was filing and causing to be filed a false and fraudulent tax return, that such restriction on the charge is surplusage.

The Government now attempts to go behind this holding and tries to show that there was evidence of aiding and abetting. This is not proper, since it does not go to the gist of the matter, i. e., the erroneous holding as a matter of law by the trial court, and its charge to the jury. Nevertheless, in fact there was no evidence adduced at the trial as to knowledge on the part of either petitioner as to the return or its contents. The hiring of an accountant is not evidence of filing a false return. The allegation that "Both men withdrew cash for their own use which they knew had not been deposited or recorded" (Brief, p. 9) is not accurate. This is based upon an admission by Bowers in a statement given to the Government (R. 16-21) that on occasion he would take petty cash from the corporation safe. There is no evidence that he knew that these amounts had not been recorded as petty cash, nor is there any evidence that these amounts, which were used as petty cash expense money, were unreported income.

Accordingly, it is submitted that the question *is* reached in this case whether that portion of an indictment specifically charging tax evasion by filing a false return may be disregarded as surplusage.

As to Question 3:

While the cases cited by petitioners on this point may have some factual differences, they are indistinguishable in principle. Where the Government itself issues prejudicial publicity in the course of a trial, a motion for a mistrial should be granted.

The Government alleges in its Brief that the verdict the jury returned was based on the evidence and was not influenced by the prejudicial publicity. Such a statement requires an omniscience which we submit the Government does not have, nor do we. We submit only the proposition that the publicity by its inherently prejudicial nature must have influenced the jury. As to the subsequent publicity noted in the Petition, we do not know whether it was read by the jurors or what effect it might have had on them since the district court refused to hold a hearing or make inquiry of the jury (R. 800-03; 188). Obviously petitioners' counsel at the trial could not interrogate the jurors except through the court.

The case of *United States* v. *Rosenberg,* 200 F. 2d 666 (2d Cir. 1952), cert. denied 345 U. S. 965, is most analogous on its facts. In that case, despite prejudicial publicity issued by the United States Attorney during the course of their trial, the defendants' counsel did not move for a mistrial. The Court of Appeals stated:

> "We may assume that, in this case, a cautionary instruction would not suffice, and that, if defendants had then moved for a mistrial, it should have been granted." (200 F. 2d 670)

As to Question 4:

The Government slurs over the multiple hearsay nature of the memorandum in issue, and seeks to argue only whether the statement attributed to Bowers was admitted in evidence for its truth or as an instruction given by him. As pointed out in the Petition, whether the statement was an instruction or not, there was still multiple hearsay involved, i. e., from Bowers to Denniston to Abbate to Lechner.

The exhibit could not have been Denniston's record of his past recollection transcribed by Lechner, since Denniston never saw the memorandum and had no recollection of the event (R. 584).

The trial court, after considerable doubt as to the admissibility of this memorandum (R. 571-73; 585-91; 1114-51) finally admitted the exhibit, stating that it was not "self-serving" and was not "inherently prejudicial" to the petitioners (R. 1126-29). It is submitted that this exhibit necessarily is hearsay upon hearsay, and is inherently prejudicial.

As to Question 5:

The Government states, as to the alleged White books, that "Whenever there was a question concerning an entry in them, the two men [White and Hampson] discussed it together" (Brief, p. 13). This record reference flaunts the fact that the trial court granted a motion to strike all statements made by the deceased White to Hampson (R. 1291-92).

The objection to the admissibility of the alleged White books is based on the complete absence of any knowledge

on the part of Hampson as to the operations of White's business, or, in fact, that such a business existed. Hampson testified that he had no way of vouching for the accuracy of the information in the exhibits (R. 133); that he was not familiar with the piers (R. 146); that John White & Co. did not have an office (R. 146-47); and that he could not testify as to the truthfulness or accuracy of the entries in the exhibits in question (R. 177).

Hampson never saw White write in the books but merely totalled entries which he had not seen entered (R. 87-88; 90). He said that he identified White's handwriting by the little notes which White would leave for him in a tavern, which notes were thrown away (R. 90). However, Hampson then testified that he never saw the individual who wrote the notes write them (R. 95). Nevertheless, the trial court erroneously overruled objections to the exhibits (R. 82; 96) stating that the witness "has been able to identify the entries in Mr. White's handwriting" (R. 126).

The summaries which Hampson made from these alleged records of White's were conceded by the Government to have probative value only as summaries, and their admissibility stands or falls with the original records alleged to be those of John White & Co.

The Government states that "The petitioners' contention here would permit only the entrant, the deceased Mr. White, to identify his entries" (Brief, p. 15). This is certainly true in this case, since no person other than White had any familiarity with these books and records. John White had eight or nine partners, all allegedly drawing equal partnership profits. Five of these partners who testified at the trial, including two "senior partners,"

stated that they had never seen the records in question (R. 56; 63; 1311; 1313; 1315). It is not unfair to require the keeper of secret records to be the only person to identify such records, especially where their introduction, without being subject to cross-examination, was used to convict three individual petitioners and their corporation of the crime of income tax evasion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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